



DECISION COVER SHEET

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To : BOARD MEMBERS

Date: August 2, 2018

From : ADMINISTRATIVE LAW JUDGE: Evelyn Matteucci

CASE: FOLSOM CHEVROLET, INC., dba FOLSOM CHEVROLET v. FCA US LLC
Protest No. PR-2483-16

TYPE: Vehicle Code section 3060 Termination

PROCEDURAL SUMMARY:

- FILED ON CALENDAR: November 10, 2016
- MOTIONS FILED:
- HEARING: January 29, 2018 through February 9, 2018; February 13, 2018, site visit
- COUNSEL FOR PROTESTANT: Halbert B. Rasmussen, Esq.
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EFFECT OF PROPOSED DECISION: The Proposed Decision sustains the Protest and does not allow General Motors to terminate Protestant's Chevrolet franchise

SUMMARY OF PROPOSED DECISION:

- Respondent contends that good cause exists to terminate Folsom Chevrolet's franchise because Folsom Chevrolet has consistently failed to capture the retail business available to it; Protestant has not achieved its contractual obligation of achieving 100 on its Retail Sales Index (RSI). Chief among the causes of Protestant's poor sales performance according to General Motor's is Folsom Chevrolet's practice of selling or trading its inventory to satisfy fleet customers, which diminishes its ability to make retail sales and runs contrary to General Motors' "suggested practices."

- General Motors also contends, as an equal basis for termination, that Folsom Chevrolet has below average Customer Satisfaction Index (CSI) scores and has consistently failed to provide adequate customer satisfaction, particularly during the new vehicle purchasing experience.
- The two most significant factors of this case are 1) the good cause factor in Section 3061 (a), which is the “amount of business transacted by the franchisee, as compared to the business available to the franchisee” and 2) the good cause factor in Section 3061 (g), which is the “extent of the franchisee’s failure to comply with the terms of the franchise.” There is the additional issue of whether the use of RSI violates Vehicle Code section 11713.13(g)(1)(A).
- RSI is used by General Motors to determine the number of sales it expects from its dealers and therefore, according to General Motors, the sales effectiveness of its dealers in selling its vehicles to retail customers. While the terms of the Dealer Agreement state that compliance with sales performance requires a RSI score of 100, the evidence presented is that for a dealer to be deemed “unsatisfactory” and be subject to termination, the dealer needs to be below 84.9 RSI and in the bottom 15 percent ranking of dealers in the state. Folsom Chevrolet adequately cured its breach in 2015 by achieving a ranking of 106 out of 131 during the Cure Period, which should have resulted in it being in the category of “Needs Significant Improvement” and not subject to termination. General Motors did not comply with the Dealer Agreement by not starting a new cure period after Folsom Chevrolet cured its breach.
- Both Folsom Chevrolet’s score on the Purchase and Delivery Survey and the regional average fall between the responses of “completely satisfied” and “very satisfied.” As to Folsom Chevrolet’s breach of the Consumer Satisfaction Index (CSI) requirement, General Motors did not offer any evidence to establish that a score between “completely satisfied” and “very satisfied,” actually demonstrates any difference in consumer satisfaction at Folsom Chevrolet. Although General Motors asserts that Folsom Chevrolet’s CSI scores placed Folsom Chevrolet in breach of contract because they were below regional average, nowhere do the terms of the Dealer Agreement require that Folsom Chevrolet’s CSI scores be above regional average to be in compliance. Additionally, Folsom Chevrolet’s Service Satisfaction Survey (SSS) score, one of two components of CSI, was not deficient.
- Folsom Chevrolet met five of the six objectives set out in Article 5.1.1 ((a)-(e)) of the Dealer Agreement to “effectively ... sell and promote ... the use of Products.” The last objective, Article 5.1.1(f), states the Dealer will: “comply with the retail sales standards established by General Motors, as amended from time to time.” The subdivisions of Article 5.1.1 do not differentiate that one provision is more important than the others. Additionally, General Motors treats each provision of Article 5.1.1 (a) through (f) as equal, asserting that Folsom Chevrolet’s poor CSI scores (a violation of Article 5.1.1(e) was as equal a breach of contract as an unsatisfactory RSI score and bottom 15 percent ranking. Folsom Chevrolet did not materially breach the contract.

- The California Vehicle Code defines retail sale as a sale of goods to a “person,” which is defined in the Vehicle Code to include businesses of all types, for the purpose of consumption and use.
- The Dealer Agreement does not provide exclusively for retail sales. The Dealer Agreement clearly contemplated business, commercial, and fleet sales. Article 9 of the Dealer Agreement states: “[t]he success of General Motors and Dealer depends to a substantial degree on Dealer taking advantage of available sales opportunities.”
- Given the failure in the contract written by General Motors to define “retail sale,” that the contract refers to fleet sales in the Dealer Agreement Addenda, and that retail under the California Vehicle Code is not limited to individuals or those smaller businesses not technically purchasing “fleet,” it is appropriate to consider Folsom Chevrolet’s fleet sales under good cause factor Section 3061 (a), which is the “amount of business transacted by the franchisee, as compared to the business available to the franchisee.” When a certain percent of fleet sales is considered, this factor weighs in Folsom Chevrolet’s favor as do all the other good cause factors.
- Vehicle Code section 11713.13, subdivision (g) provides, that it is “unlawful and a violation of this code for a manufacturer ... to do any of the following: (g)(1) [e]stablish or maintain a performance standard ... that may materially affect a dealer, ... unless ... the performance standard ... is reasonable in light of all existing circumstances,” including, but not limited to, those set forth in (A) (i) through (v), such as demographics in the dealer’s area of responsibility, geographical and market characteristics in the dealer’s area of responsibility, local economic circumstances, and historical sales, service and customer service performance of the line-make, including vehicle brand preference of consumers in the dealer’s area of responsibility.
- The use of RSI generally by General Motors, and as applied in this case, violates Vehicle Code section 11713.13(g)(1) (A). RSI fails to account for the impact of circumstances unique to Folsom Chevrolet’s market (other than segment popularity), including but not limited to demographics, geography and brand preferences. The RSI metric overstates sales opportunity, does not account for sales outside Folsom Chevrolet’s Area of Geographic Sales and Service (AGSSA), does not account for local condition. Additionally, Folsom Chevrolet was assigned an unfair AGSSA in size and distances of registrations from the dealership, and one which grew over 80 percent in registrations between 2010 and 2014. A metric that fails to account for the brand bias that the California Vehicle Code requires it to consider, and which results in a sales requirement inflated by 30 percent, is not reasonable in light of all circumstances.

RELATED MATTERS:

- Related Case Law: *Beck Chevrolet Co., Inc. v. General Motors LLC* (2016) 27 N.Y. 3d 379
- Applicable Statutes and Regulations: Vehicle Code sections 331, 331.1, 331.2, 520, 3050, 3060, 3061, 3066, and 11713.13.